

STATE OF MICHIGAN  
COURT OF APPEALS

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In the Matter of MV, Minor.

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ANGELIQUE BLIESENER,

Petitioner-Appellee,

v

RICARDO VEGA,

Respondent-Appellant.

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UNPUBLISHED

April 4, 2006

No. 264226

Clinton Circuit Court

Family Division

LC No. 04-017501-NA

Before: Wilder, P.J., and Zahra, and Davis, JJ.

PER CURIAM.

Respondent appeals as of right from the trial court order terminating his parental rights to the child, seeking reversal of the order on two grounds: (1) petitioner lacked standing to file the petition seeking termination of his parental rights and (2) petitioner and the court violated MCR 2.004. We find that petitioner had standing to petition for termination of respondent's parental rights, and that noncompliance with MCR 2.004 does not require reversal because any error was harmless.

I. Basic Facts and Proceedings

In June 2003, a jury convicted respondent of two counts of first degree-criminal sexual conduct involving his daughter, the minor child. The trial court departed downward from the sentencing guidelines range,<sup>1</sup> and sentenced him to concurrent terms of 42 to 120 months' imprisonment for his convictions. This Court affirmed defendant's convictions.<sup>2</sup> Throughout these proceedings, defendant has been incarcerated at the Ojibway Correctional Facility in Michigan.

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<sup>1</sup> *People v Ricardo Felix Vega, Jr.*, unpublished opinion per curiam of the Court of Appeals, issued November 23, 2004 (Docket No. 249578) (Cooper, J., *dissenting*).

<sup>2</sup> *People v Ricardo Felix Vega, Jr.*, unpublished opinion per curiam of the Court of Appeals, issued November 23, 2004 (Docket No. 249578).

In October 2004, the Department of Human Services placed the minor child, along with a half-sibling, in its temporary custody based on allegations that petitioner, the children's mother, had neglected the children. Petitioner successfully participated in services and regained custody of the minor child. The court and the Department advised her to seek termination of respondent's parental rights in order to protect the minor child. On May 24, 2005, petitioner filed a motion seeking termination of respondent's parental rights. On June 1, 2005, respondent was personally served with the petition to terminate parental rights, summons, and notice of hearing. Respondent did not participate in the June 30, 2005 termination hearing. At the conclusion of the trial, the court concluded that the evidence supported termination of respondent's parental rights under MCL 712A.19(b)(3)(g), (j), (k)(i), and (k)(ii).

#### I. Petitioner's Standing To Seek Termination of Respondent's Parental Rights

On appeal, respondent does not challenge the grounds upon which his parental rights were terminated. Rather, respondent seeks reversal of the court's order on the grounds that petitioner lacked standing to seek termination of his parental rights and that the court and petitioner failed to comply with the procedural requirements of MCR 2.004 with the result that he was not properly notified of the child custody proceedings or of his right to participate in proceedings by telephone.

The parties that may file a petition for termination of parental rights are listed under MCL 712A.19b(1) as "the prosecuting attorney, . . . the child, guardian, custodian, concerned person as defined in subsection (6), agency, or children's ombudsman as authorized in Section 7 of the children's ombudsman act." Respondent contends that because "parent" is not among the specifically enumerated parties entitled to file petitions, a parent lacks standing to do so under the statute. Petitioner, on the other hand, contends that she is the child's "custodian" and has standing to file a petition as such.

In *In re Huisman*, 230 Mich App 372, 379-381; 584 NW2d 349 (1998), overruled in part by *In re Trejo*, 462 Mich 341; 612 NW2d 407 (2000), the Court concluded that the word "custodian" in § 19b(1) encompasses a custodial parent. Respondent specifically argues that "[i]n *Huisman* the Court discerned no statutory basis to distinguish between the term custodian and the term parent. It is this thinking with which [respondent] disagrees, and urges this Court to reconsider its rule in *Huisman* . . . . "

However, this Court has since addressed the definition of "custody," under the Juvenile Code. This Court, in *In re Hudson*, 262 Mich App 612; 687 NW2d 156 (2004), relied on the definition of "custodian" from the Uniform Transfers To Minors Act (MUTA), MCL 554.521 *et seq.*, to conclude that a custodian under the Juvenile Code refers to an individual who acquires legal possession of a minor's property and, consequently, accepts all the fiduciary obligations that normally attach to such a position of responsibility. *Id.* at 614. The term also refers to the individual with the legal obligation to provide for the financial, emotional, and physical care and protection of the child. *Id.* The *Hudson* Court, conceding that its definition of "custodian" was not consistent with that of *Huisman*, stated in dicta that *Huisman* had been overruled by *Trejo*. *Id.* at 614 n 1. However, a close inspection of *Trejo* reveals that the Court did not overrule the portion of *Huisman* that pertained to the Court's definition of "custodian" under the Juvenile Code. *Trejo*, *supra* at 353. Nonetheless, even if *Huisman* is disregarded and the *Hudson* Court's definition of "custodian" is applied to the instant case, the facts show that petitioner, who was

responsible for the child's property and her financial, emotional, and physical care and protection, qualifies as a "custodian" under *Hudson*. Therefore, as a custodian, petitioner had standing under § 19b(1) to file a petition to terminate respondent's parental rights.

### III. Failure to Comply with MCR 2.004

Respondent argues that notices from the court and petitioner failed to comply with MCR 2.004<sup>3</sup> and that reversal is therefore required.

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<sup>3</sup> MCR 2.004 provides, in pertinent part, that:

(B) The party seeking an order regarding a minor child shall

(1) contact the department to confirm the incarceration and the incarcerated party's prison number and location;

(2) serve the incarcerated person with the petition or motion seeking an order regarding the minor child, and file proof with the court that the papers were served; and

(3) file with the court the petition or motion seeking an order regarding the minor child, stating that a party is incarcerated and providing the party's prison number and location; the caption of the petition or motion shall state that a telephonic hearing is required by this rule.

(C) When all the requirements of subrule (B) have been accomplished to the court's satisfaction, the court shall issue an order requesting the department, or the facility where the party is located if it is not a department facility, to allow that party to participate with the court or its designee by way of a noncollect and unmonitored telephone call in a hearing or conference, including a friend of the court adjudicative hearing or meeting. The order shall include the date and time for the hearing, and the prisoner's name and prison identification number, and shall be served by the court upon the parties and the warden or supervisor of the facility where the incarcerated party resides.

(D) All court documents or correspondence mailed to the incarcerated party concerning any matter covered by this rule shall include the name and the prison number of the incarcerated party on the envelope.

(E) The purpose of the telephone call described in this rule is to determine

(1) whether the incarcerated party has received adequate notice of the proceedings and has had an opportunity to respond and to participate,

(2) whether counsel is necessary in matters allowing for the appointment of counsel to assure that the incarcerated party's access to the court is protected,

(continued...)

As mentioned, respondent received the petition to terminate parental rights, summons, and notice of hearing. However, the caption of the petition to terminate parental rights did not indicate defendant's right to a telephonic hearing, as provided under MCR 2.004. Also, the record does not reflect that the trial court issued an order pursuant to MCR 2.004(C) requesting that respondent be allowed to participate in the proceedings by telephone. Thus, there appears to be error.

However, MCR 2.613(A) provides that:

An error in the admission or the exclusion of evidence, an error in a ruling or order, or an error or defect in anything done or omitted by the court or by the parties is not ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice.

We conclude that refusing to disturb the termination order is not inconsistent with substantial justice. Respondent claims prejudice resulting from his not being informed that he could participate in the hearing by phone. However, the record shows that petitioner informed respondent of his right to participate by phone:

The half a dozen time [respondent] has written to me since he has been in prison, I have responded twice: Once to say if you're not sending me a letter – money in these envelopes, don't send anything, and the other was to say, you know, you have a right to be at Court by telephone and have representation.

In addition, respondent initially did not attribute his lack of participation to a defective caption, but claimed that he “was denied [his] right to be present during the hearing due to a communication error between the court and the correction facility.” Thus, the record does not

(...continued)

(3) whether the incarcerated party is capable of self-representation, if that is the party's choice,

(4) how the incarcerated party can communicate with the court or the friend of the court during the pendency of the action, and whether the party needs special assistance for such communication, including participation in additional telephone calls, and

(5) the scheduling and nature of future proceedings, to the extent practicable, and the manner in which the incarcerated party may participate.

(F) A court may not grant the relief requested by the moving party concerning the minor child if the incarcerated party has not been offered the opportunity to participate in the proceedings, as described in this rule. This provision shall not apply if the incarcerated party actually does participate in a telephone call, or if the court determines that immediate action is necessary on a temporary basis to protect the minor child.

establish that noncompliance with MCR 2.004 caused respondent not to participate at the hearing.

Moreover, assuming but not deciding that failing to comply with MCR 2.004 is a constitutional error, we are satisfied beyond a reasonable doubt that respondent's participation in the hearing would not have affected the outcome of the proceedings. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). A jury convicted respondent of raping his six-year-old biological daughter. She testified at his trial. Petitioner indicated, in respondent's presentence investigation report and at the termination hearing, that defendant's sexual abuse of his daughter at the latest began when she was three. Respondent's jury conviction conclusively establishes the grounds for termination under MCL 712a.19b(3)(n), and the record leaves no doubt that termination of respondent's parental rights was in the best interests of the minor child. Therefore, this Court finds reversal is not required.

Affirmed.

/s/ Kurtis T. Wilder

/s/ Brian K. Zahra

/s/ Alton T. Davis